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Supreme Court, U.S.
FILED

No. 10-1407

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In The

Supreme Court of the United States

JASON MATTHIS,

Petitioner,

v.

THE STATE OF LOUISIANA
AND BURL CAIN, WARDEN,
THE LOUISIANA STATE PENITENTIARY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In light of the policy announced in *Jimenz v. Quarterman*, whether the finality of a conviction for purposes of section 28 U.S.C. § 2244(d)(1) is destroyed and/or the limitations clock is reset when a lower state court grants a state prisoner's application for post-conviction relief and vacates the conviction but the conviction is subsequently reinstated by a higher state court. Petitioner notes that this case presents a matter of first impression before this Honorable Court.

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OPINIONS BELOW

Mr. Matthis brought his current action under 28 U.S.C. § 2254 before the Eastern District Court for the State of Louisiana following his conviction for second degree murder in Orleans Parish District Court. Following an adverse ruling in the Eastern District Court related to tolling issues, Mr. Matthis sought and was granted a certificate of appealability by the Fifth Circuit on issues relating to the tolling of the time limitations set forth by 28 U.S.C. § 2244. The briefing schedule provided that Mr. Matthis' brief would be due forty (40) days from February 5, 2010. Mr. Matthis filed timely his brief in accordance with the Honorable Court's order. On December 13, 2010 a three judge panel consisting of Judges Wiener, Garza, and Prado issued an opinion, with Judge Prado writing for the Court, affirming the decision of the Eastern District Court for the State of Louisiana which denied Mr. Matthis' petition for habeas corpus. In its opinion the panel held, "Because the overturning and reinstatement of Appellant's conviction occurred solely through post-conviction review, we find that this [the granting of a new trial on post-conviction relief] did not affect the date his conviction became final under direct review and thus his federal habeas petition was untimely." (Opinion No. 09-30-576 at p. 2). Mr. Matthis petitioned the Fifth Circuit for panel rehearing in accordance with Rule 40. That rehearing was denied January 20, 2011.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL LAW PROVISIONS INVOLVED

28 U.S.C. § 2244 which provides "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court."

STATEMENT OF THE CASE AND OF FACTS

An Orleans Parish Grand Jury filed a bill of indictment charging Mr. Matthis with violating La.R.S. 14:30.1, to wit: Second degree murder. (SCR v.4). Mr. Matthis elected a trial by Judge Leon Cannizzaro and was convicted in September of 1999. (SCR v.4, Tr. 9/21/99, p. 9-10). In accordance with Louisiana law, Mr. Matthis was sentenced to life in prison without benefit of parole, probation, or suspension of sentence. Mr. Matthis' conviction and sentence was affirmed by the Louisiana Fourth Circuit Court of Appeal under *State v. Matthis*, 775 So.2d 558. (SCR v.4). The Louisiana Supreme Court denied his petition for writ of certiorari on November 9, 2001 under *State v. Matthis*, 801 So.2d 358. Mr. Matthis filed a motion for post-conviction relief in the trial court in November of 2002. The trial court

granted Mr. Matthis a new trial on November 8, 2006. (SCR v.5). The State of Louisiana appealed the decision. The Louisiana Fourth Circuit Court of Appeal denied supervisory review. On November 2, 2007, the Louisiana Supreme Court reversed the lower court decisions and reinstated Mr. Matthis' conviction and sentence. See 970 So.2d 505. (SCR v.5). Mr. Matthis' petition for rehearing was denied on January 7, 2008. He did not apply for direct review with the United States Supreme Court. Mr. Matthis filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Louisiana on July 28, 2008. (R.v.1, Exh. 1). The Honorable Alma L. Chasez issued a report and recommendation denying Mr. Matthis' request for habeas relief on grounds that Mr. Matthis was time barred on May 27, 2009. (R.v.1, Exh. 26). Mr. Matthis filed an objection to the report on June 10, 2009. (R.v.1, Exh. 30) The Honorable Ivan L. R. Lemelle adopted the report and recommendations on June 30, 2009 (R.v.1, Exh. 33) and entered a judgment against Jason Matthis on that same date. (R.v.1, Exh. 34). Mr. Matthis filed a notice of appeal with the Eastern District on July 8, 2009. (R.v.1, Exh. 35). His request for a certificate of appealability was denied by Judge Lemelle on July 21, 2009. (R.v.1, Exh. 38). Mr. Matthis filed timely and was granted his request for a certificate of appealability with this Honorable Court. This Honorable Court certified the question to be answered as: Whether the finality of a conviction for purposes of section 2244(d)(1) is destroyed when a lower state court grants a state prisoner's application

for post-conviction relief and vacates the conviction, and whether the limitations clock is reset when the conviction is subsequently reinstated by a higher state court, with particular attention to *Jimenez v. Quarterman*, 129 S.Ct. 681, 686 (2009). Mr. Matthis now files his appeal to answer the questions certified as instructed by this Honorable Court. On December 13, 2010 a three judge panel consisting of Judges Wiener, Garza, and Prado issued an opinion, with Judge Prado writing for the Court, affirming the decision of the Eastern District Court for the State of Louisiana which denied Mr. Matthis' petition for habeas corpus. In its opinion the panel held, "Because the overturning and reinstatement of Appellant's conviction occurred solely through post-conviction review, we find that this [the granting of a new trial on post-conviction relief] did not affect the date his conviction became final under direct review and thus his federal habeas petition was untimely." (Opinion No. 09-30-576 at p. 2). Mr. Matthis now files timely his petition for panel rehearing with this Honorable Court.

REASONS FOR GRANTING THE WRIT

Here, Mr. Matthis brings the novel question of whether he constituted a person in custody under the plain meaning of 28 U.S.C. § 2244(d)(1) for purpose of the tolling of the statute of limitations for filing his federal habeas corpus petition where Mr. Matthis was granted a new trial pursuant to his post-conviction

application in the State court and physically released from custody. Mr. Matthis contends that in light of the recent decision in *Jimenez v. Quarterman*, 129 S.Ct. 681, 686 (2009) he was not in custody under the plain language of the statute and his petition for habeas corpus relief was filed timely. The unique facts of Mr. Matthis' case present a narrow issue of first impression and statutory interpretation before this Honorable Court.

SUMMARY OF THE ARGUMENT

Under the plain language of 28 U.S.C. § 2244(d)(1), Mr. Matthis was not subject to any time limitations once he was granted a new trial as he no longer stood in the position of a person in custody pursuant to the judgment of a state court as is required by 28 U.S.C. § 2244(d)(1). Mr. Matthis' conviction and sentence did not become final until the Louisiana Supreme Court reinstated his conviction and sentence and his time for direct review of that decision expired because, until that point, Mr. Matthis' conviction was capable of modification at both the trial court and appellate court level.

STANDARD OF REVIEW

This Honorable Court reviews the Federal District Court's factual findings for clear error and its findings of law *de novo. Soffar v. Johnson,* 237 F.3d

411, 455 (5th Cir. 2000). A denial of a federal habeas petition on procedural grounds is reviewed *de novo*. *Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003).

LAW AND ARGUMENT

1. Petitioner's application for habeas relief was timely filed under the AEDPA.

Under a traditional analysis of the time for filing of Petitioner's complaint, Mr. Matthis' original conviction and sentence became final on February 8, 2002. Mr. Matthis filed a post-conviction application with the trial court on November 8, 2002. The final ruling on the petition for post-conviction relief occurred on January 7, 2008 when Mr. Matthis' request for rehearing before the Louisiana Supreme Court was denied. Ninety days from that date was April 7, 2008, the date upon which Mr. Matthis' post-conviction application was final. This means that Mr. Matthis' post-conviction application tolled the running of the statute of limitations in this matter until April 7, 2008. As of April 7, 2008, Mr. Matthis had utilized 272 days of the 365 days in which he had to file, leaving an additional ninety (90) days in which to file his application. However, Mr. Matthis' post conviction application resulted in the granting of a **new trial in the interest of justice**. This places Mr. Matthis' application in a different light. Mr. Matthis contends that his original conviction did not become final until the new trial had been denied by the Louisiana

Supreme Court and Mr. Matthis had exhausted his appellate remedies on that issue. This date would be April 7, 2008 placing his July 28, 2008 filing well within the 365 day filing requirement for habeas relief. Here, Mr. Matthis contends that the granting of a new trial rendered his conviction and sentence as not final for purposes of the AEDPA because Mr. Matthis was not "a person in custody pursuant to the judgment of a State court" until his conviction was reinstated by the Louisiana Supreme Court on November 2, 2007.

Upon being granted a new trial, Mr. Matthis was restored to pre-trial status. Mr. Matthis was no longer convicted or sentenced. While the panel was correct that the overturning of Mr. Matthis' conviction and the granting of the new trial did not restore his position to that of being on direct review, the panel misses a more significant fact. Mr. Matthis was restored to a point in time before direct review. That is, Mr. Matthis was restored to pre-trial status enjoying the presumption of innocence as an unconvicted and free man. In fact, he was free on bond standing before any and all courts as an innocent man. In this position, Mr. Matthis was unable to file a petition for habeas corpus because he was not convicted and was not "in custody pursuant to the judgment of a State court" as required by 28 U.S.C. § 2244(d)(1). Hence, Mr. Matthis' status is factually distinct from any existing case law. However, this Honorable Court should consider the principles announced in *Jimenez*

v. Quarterman, 129 S.Ct. 681 (2009) when determining the finality of Mr. Matthis' conviction.

In determining what constituted a final conviction, the *Jimenez* Court paid close attention to the plain language of the statute. Here, the plain language of section 2244(d)(1) states: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus **by a person in custody pursuant to a judgment of a State court.**" (emphasis added). When the trial court granted Mr. Matthis a new trial, he no longer had standing as a person in custody pursuant to a judgment of a State court and therefore, under a plain reading of the statute, no period of limitation applied. It is illogical that the period of release upon being granted a new trial would be accounted for in the tolling provisions of 28 U.S.C. § 2244(d)(2). Had the overturning of Mr. Matthis' conviction been upheld, Mr. Matthis would be before the State trial court facing the equal possibility of being acquitted on the charge. Such a procedural stance is accounted for in the AEDPA, not by the tolling statute but by the plain language requirement that a person be "**in custody**" in order to avail himself of federal habeas relief.

This Honorable Court must then address at what point the period of limitation began. Again, the recent *Jimenez* decision, although not directly on point, provides guidance. The *Jimenez* Court noted that a conviction cannot be final when the petitioner's conviction is still capable of modification through

appellate review by the State courts. Here, Mr. Matthis' original conviction was capable of modification through trial and direct appeal from the date the new trial was granted until the Louisiana Supreme Court reinstated that conviction on November 2, 2007. Thus, Mr. Matthis contends that his conviction and sentence were not final until ninety (90) days after they were finally imposed by the Louisiana Supreme Court on January 7, 2008, the date upon which Mr. Matthis' request for rehearing was denied. At that point, Mr. Matthis had ninety (90) days to take his matter to the United States Supreme Court or until April 7, 2008, the date on which his conviction became final. Hence, Mr. Matthis filing of his habeas petition in July of 2008 was well within the one year filing period.

CONCLUSION AND PRAYER

Because of the foregoing facts and law it is clear that Petitioner has shown that his petition for habeas relief was filed well within the statutory filing period. Therefore it was error for the three judge panel to deny petitioner's application on procedural grounds. Petitioner now prays this Honorable Court grant his petition for panel review, reverse the present decision, and remand the matter to the

district court for review of his original petition on the merits.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-30576

JASON MATTHIS

Petitioner-Appellant

v.

BURL CAIN, WARDEN,
LOUISIANA STATE
PENITENTIARY

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Dec. 13, 2010)

Before WIENER, GARZA, and PRADO, Circuit Judges.

PRADO, Circuit Judge:

Jason Matthis ("Appellant") appeals the district court's dismissal of his habeas corpus petition brought pursuant to 28 U.S.C. § 2254 as untimely. The district court found that Appellant's petition was time-barred by 28 U.S.C. § 2244(d)(1). The court held that Appellant exceeded the limitations period

because he filed his federal habeas petition more than one year after the date his state conviction became final by conclusion of direct review, notwithstanding tolling of the limitations period during the pendency of his state post-conviction review pursuant to 28 U.S.C. § 2244(d)(2). Appellant contends that because the state district court vacated his conviction and granted him a new trial on post-conviction review, the finality of his conviction was destroyed for purposes of § 2244(d)(1). He argues that especially in light of the principles announced in *Jimenez v. Quarterman*, 129 S.Ct. 681 (2009), his conviction was not final on direct review under 28 U.S.C. § 2244(d)(1)(A) until the Louisiana Supreme Court reinstated his conviction and sentence. Because the overturning and reinstatement of Appellant's conviction occurred solely through post-conviction review, we find that this did not affect the date his conviction became final under direct review and thus his federal habeas petition was untimely. We therefore affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Jason Matthis was convicted of second-degree murder in Louisiana state court on September 22, 1999, and sentenced to life in prison. The Louisiana Fourth Circuit Court of Appeal affirmed, and the Louisiana Supreme Court denied Appellant's application for a writ of certiorari on November 9, 2001. On February 8, 2002, after the ninety-day period for petition to the U.S. Supreme Court expired, Appellant's conviction became final. On November 8, 2002,

Appellant filed an application for state post-conviction relief. The state district court granted post-conviction relief and ordered a new trial on November 8, 2006. After the Louisiana appellate court declined to overturn the state district court, the Louisiana Supreme Court reversed the state district court's grant of post-conviction relief and reinstated Appellant's conviction and sentence on November 2, 2007. The Louisiana Supreme Court thereafter denied his petition for rehearing on January 7, 2008.

Appellant filed his federal habeas petition on July 28, 2008. The district court dismissed his petition with prejudice as untimely on June 30, 2009, and denied a certificate of appealability ("COA") thereafter. After Appellant timely appealed, we granted a COA on the issue of whether Appellant's habeas petition was time-barred under 28 U.S.C. § 2244(d)(1).

II. DISCUSSION

Appellant acknowledges that under "traditional analysis" his conviction became final by the conclusion of direct review on February 8, 2002. Starting from this date, 272 days elapsed before the limitations period was tolled by his filing of a state post-conviction petition. After his state post-conviction review concluded, another 202 days elapsed before Appellant filed his federal habeas petition. Thus, 474 days had elapsed (excluding the tolling period), thereby exceeding the one-year limitations period.

Appellant nonetheless claims that this Court should find his petition timely, because when the state district court vacated his conviction and ordered a new trial, he was no longer a "person in custody pursuant to the judgment of a State court" under 28 U.S.C. § 2244(d)(1). Therefore, Appellant argues, the finality of the judgment was destroyed for the purposes of § 2244(d)(1)(A), resetting the limitations period. Appellant asserts that the limitations period did not begin until the Louisiana Supreme Court reinstated his conviction. He further cites the Supreme Court's 2009 decision in *Jimenez* as support for his contention that "a conviction cannot be final when the petitioner's conviction is still capable of modification by appellate review by the State courts."

"We review de novo the denial of a federal habeas petition on procedural grounds." *Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") includes a limitations period for the filing of a federal habeas petition "by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1); *see Lawrence v. Florida*, 549 U.S. 327 (2007). The statute provides that the limitations period shall run from the latest of four possible dates, the relevant one here being "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). This provision works in conjunction with 28 U.S.C. § 2244(d)(2), which provides for a tolling of the limitations period

during the time in which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment is pending." The Supreme Court has further held that "the conclusion of direct review occurs when 'this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari,'" or when the "'the time for filing a certiorari petition expires.'" *Jimenez*, 129 S.Ct. at 685 (quoting *Clay v. United States*, 537 U.S. 522, 527, 528-32 (2003)).

Although the question of whether the overturning and subsequent reinstatement of a conviction on state post-conviction review destroys the finality of a judgment for purposes of § 2244(d)(1)(A) is one of first impression in this Circuit,[1] its answer is straightforward. The language of § 2244(d)(1)(A) plainly refers to the date on which the "judgment became final by *the conclusion of direct review* or the expiration of time for seeking such review." 28 U.S.C. § 2244(d)(1)(A) (emphasis added). Guided by the maxim that "when the statutory language is plain, we

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[1] This Court addressed a similar factual scenario in a previous unpublished summary calendar opinion; the issue in that case, however, was not whether the defendant's petition was timely, but whether the Court should equitably toll the statute of limitations for petitioner's otherwise untimely habeas petition. *See LeBlanc v. Travis*, 352 F. App'x 966 (5th Cir. 2009). Although the issue before the court was different, it did note that "[t]he decision of the Louisiana Supreme Court [reinstating petitioner's conviction after it was initially overturned on post-conviction review] cannot be considered a new charge that began a new finality date." *Id.* at 967.

must enforce it according to its terms," *Jimenez*, 129 S.Ct. at 685, Appellant must therefore show that the state district court's overturning of his conviction constituted a reinstatement of *direct review*. This he cannot do. As Appellant acknowledges in his brief, the state district court overturned his conviction on *post-conviction review*, not on direct review. The language of the statute clearly distinguishes between the two phases of review, accounting for direct review under § 2244(d)(1)(A), and allowing for tolling during post-conviction review under § 2244(d)(2).

The reference of § 2244(d)(1) to "a person in custody pursuant to the judgment of a State court" also does not change the result. When Appellant filed his application for a writ of habeas corpus, he was in, and remains in, custody pursuant to the state court judgment. His period of release after the conviction was overturned on post-conviction review and before the conviction was reinstated was accounted for by § 2244(d)(2); the limitations period was tolled during his release as well as the entirety of his post-conviction review in state court.

The Supreme Court's decision in *Jimenez* also provides no support to Appellant's argument. *Jimenez* dealt with the question of whether a state court's grant of an out-of-time appeal to reopen direct review of the petitioner's conviction destroyed the finality of the judgment on direct review under § 2244(d)(1)(A). *See* 129 S.Ct. at 686. The Court held that "where a state court grants . . . the right to file an out-of-time *direct* appeal during state collateral review, but before the defendant has first sought federal habeas

relief, his judgment is not yet 'final' for purposes of § 2244(d)(1)(A)." *Id.* (emphasis added). The Court further noted that its decision was "a narrow one." *Id.* Because it is uncontested that, unlike in *Jimenez,* the state courts overturned and then reinstated Matthis's conviction on post-conviction, and not direct review, *Jimenez* is inapposite.

The only other situation in which claims for post-conviction relief may potentially implicate § 2244(d)(1)(A) is where the state uses a method of appeal by which the direct appeal is stayed while the defendant institutes proceedings for post-conviction relief, and the direct and post-conviction appeals are consolidated and decided together. *See Nelson v. Hvass,* 280 F.3d 872, 873-74 (8th Cir. 2002) (holding that where Minnesota court procedures require such a process and the state appellate court hears both the direct appeal and post-conviction-relief appeal together, direct review is not final until the combined appeal is concluded). Louisiana does not require such a procedure, and here, Appellant's direct review concluded before he instituted proceedings for post-conviction relief.

III. CONCLUSION

We therefore affirm the decision of the district court dismissing Appellant's habeas application as untimely pursuant to § 2244(d)(1).

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JASON MATTHIS	**CIVIL ACTION**
VERSUS	**NO. 08-4049**
BURL CAIN, WARDEN LOUISIANA STATE PENITENTIARY	**SECTION: "B"(5)**

ORDER AND REASONS

Before the court is Petitioner Jason Matthis' objections to the May 27, 2009 Report and Recommendation of United States Magistrate Judge Alma Chasez, who recommended that the petition of Mr. Matthis 28 U.S.C. § 2254 habeas claims be dismissed with prejudice as untimely. (Rec. Doc. No. 30). For the following reasons, petitioner's objections are overruled and the Magistrate Judge's Report and Recommendation are adopted as the opinion of the court.

Facts of Case:

On September 22, 1999, Jason Matthis (hereinafter "Petitioner") was convicted of second-degree murder in Orleans Parish and was sentenced to life in prison without benefit of parole, probation, or suspension of sentence. The Louisiana Fourth Circuit Court of Appeal affirmed petitioner's conviction and sentence on November 29, 2000. *State v. Matthis*, 775 So.2d 558 (La. App. 4th Cir. 2000). On November 9, 2001, the Louisiana Supreme Court

denied petitioner's application for writ of certiorari. *State v. Matthis*, 801 So.2d 358 (La. 2001). Petitioner's conviction became final on February 8, 2002. On November 8, 2002, petitioner filed his first post-conviction relief application. The trial court granted petitioner's post-conviction relief application and following an evidentiary hearing, the trial court granted relief and ordered a new trial on November 8, 2006. (St. ct. rec., vol 1). In response to the trial court's ruling, the state sought supervisory review in the Louisiana Fourth Circuit Court of Appeals, which denied its application, and affirmed the trial court's decision in favor of petitioner's PCRA. *Id* at 801 So. 2d 358. The state then sought review from the Louisiana Supreme Court, which reversed the lower court's grant of petitioner's post-conviction relief, and reinstated petitioner's conviction and sentence on November 2, 2007. *State v. Matthis*, 970 So.2d 505 (La. 2007). Petitioner, thereafter filed a petition for rehearing, which was denied by the Louisiana Supreme Court on January 7, 2008. On July 28, 2008, petitioner filed his habeas corpus petition. (Rec. doc. 1, p. 1).

Law and Argument:

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA requires a petitioner to bring his application for a writ of habeas corpus within one year of the date his conviction became final. 28 U.S.C. § 2244(d)(1). However, the AEDPA's one-year limitation period is

tolled for the period of time during which a properly filed application for state post-conviction relief or other collateral review attacking a conviction or sentence is pending in state court. 28 U.S.C. § 2254(d)(2). Additionally, a petitioner has ninety days to file a writ of certiorari in the United States Supreme Court after a decision is rendered by the state's highest court. U.S. Sup. Ct. 13(1); *See also Robert v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003).

The Louisiana Supreme Court denied Petitioner's writ application on November 9, 2001. *See Matthis* 801 So. 2d 358. Petitioner's time for seeking further review expired when he did not file any further review petition. Therefore, petitioner's conviction became final and the AEDPA's one-year limitations period for seeking federal habeas relief began to run on February 8, 2002. (Rec. Doc. 26 at 2).

Petitioner argues that his conviction was no longer final for AEDPA purposes when he was granted a new trial on November 8, 2006, by the state. Specifically, petitioner asserts that the running of the AEDPA limitation should have been restarted when he was granted a new trial and was out on bond. (Rec. Doc. 30 at 6).

However, the Fifth Circuit held that a federal court is not obligated to restart the running of AEDPA's limitation period. *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004). In *Salinas*, the United States Fifth Circuit ruled that the AEDPA's one-year limitation period does not restart when a petitioner

acquires the right to file an out-of-time appeal. *Id* at 430. The right to file an out-of-time appeal merely tolls the statute of limitations until the date on which the Court of Criminal Appeals declines to grant further relief. *Id*. The same should apply here.

In terms of the AEDPA and 28 U.S.C. §2244, the petitioner's one-year limitation period began to run on February 8, 2002. (Rec. Doc. 26). Petitioner's limitations period ran uninterrupted for two hundred seventy-two days, until November 8, 2002, when the petitioner timely filed his first post-conviction relief application (PCRA). (Rec. Doc. 30 at 2). The Louisiana Supreme Court denied petitioner's PCRA rehearing, on January 7, 2008. (Rec. Doc. No. 26). Between November 8, 2002 and January 7, 2008, petitioner's PCRA remained pending in state courts, thus tolling his one-year statute of limitation period pursuant to §2244(d)(2). Petitioner's §2244(d) limitation period began to run again on January 7, 2008, in which petitioner only had 93 days remaining under the AEDPA limitations period. It was not until July 28, 2008, two hundred and two days later, did petitioner file his federal habeas petition. (Rec. doc. 1 at 1). The 272 days prior to the first PCRA filing, when combined with the 202 days until the habeas petition was filed far exceeds the AEDPA's one-year statute of limitations. That excessive period of time is fatal to petitioner's claim.

Accordingly, the instant § 2254 habeas application is hereby **DISMISSED WITH PREJUDICE** as untimely.

New Orleans, Louisiana, this 30th day of June, 2009.

/s/ Ivan L.R. Lemelle
IVAN L.R. LEMELLE
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JASON MATTHIS	**CIVIL ACTION**
VERSUS	**NO. 08-4049**
BURL CAIN, WARDEN LOUISIANA STATE PENITENTIARY	**SECTION: "B"(5)**

JUDGEMENT

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of Respondent, Burl Cain, and **against** Petitioner, Jason Matthis, dismissing **with prejudice** Jason Matthis' § 2254 habeas claims.

New Orleans, Louisiana, this 30th day of June, 2009.

/s/ Ivan L.R. Lemelle
IVAN L.R. LEMELLE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30576

JASON MATTHIS,

Petitioner-Appellant

v.

BURL CAIN, WARDEN,
LOUISIANA STATE
PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

(Filed Jan. 20, 2011)

Before WIENER, GARZA, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Edward C. Prado
United States Circuit Judge